

NO. 41718-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROGER R. MARTIN,

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LICENSING,

Appellant.

OPENING BRIEF OF APPELLANT

ROBERT M. MCKENNA
Attorney General

TONI M. HOOD
WSBA # 26473
Assistant Attorney General
Attorneys for Respondent
PO Box 40110
Olympia, WA 98504-0110
Phone: (360) 586-2644
Fax: (360) 664-0174
E-mail: LALOLyEF@atg.wa.gov

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I. INTRODUCTION

Roger Martin, a Commercial Driver's License (CDL) endorsement holder, was arrested for driving under the influence while driving his personal vehicle. Martin was read the implied consent warnings, acknowledged receiving them, and expressed no confusion about their meaning. He then took breath alcohol tests, which showed his breath alcohol content exceeded the legal limit. As a result, the Department of Licensing ("Department") suspended his driver's license for 90 days and disqualified his CDL endorsement for one year. As this Court held in *Lynch v. Dep't of Licensing*, 163 Wn. App. 697, 262 P.3d 65 (2011), the implied consent warnings that the arresting officer gave to Martin are accurate and not misleading. The Court should follow that holding.

Additionally, WAC 308-103-070(10)—the Department's rule requiring a hearing examiner to continue a hearing if a duly subpoenaed law enforcement officer fails to appear for the hearing of a CDL holder—honors constitutional guarantees of due process. Here, Martin subpoenaed the trooper who arrested him. When the administrative hearing was originally convened, the trooper failed to appear. The hearing examiner originally dismissed the suspension, but upon learning that Martin is a CDL holder, reconvened the hearing, vacated her dismissal order, and continued the hearing to allow the trooper to appear. During the pendency of the continuance and until a week after the hearing examiner issued her decision, Martin's driver's license and CDL remained valid.

Martin had the opportunity to cross-examine the trooper, on whose sworn report the Department relied to suspend his driver's license. The trooper's failure to appear for the original hearing date did not entitle Martin to a dismissal. The hearing examiner did not err in continuing the hearing, and the rule requiring her to do so is consistent with case law and constitutional guarantees of due process and equal protection. The Department respectfully requests that this Court reverse the order of the superior court, thereby affirming the hearing examiner's order suspending Martin's driver's license.

II. ASSIGNMENTS OF ERROR

The Department assigns no error to the decision subject to this Court's review: the hearing examiner's order suspending Martin's driver's license. However, the Department assigns error to the following aspects of the superior court's ruling:

1. The superior court erred in holding that the implied consent warnings read to Martin were so misleading to Martin, a CDL holder, as to deprive him of the opportunity to make a knowing and intelligent decision about whether to take the breath test.
2. The superior court erred in holding that the allegedly misleading warnings resulted in actual prejudice to Martin.
3. The superior court erred in reversing the Department's order sustaining Martin's driver's license suspension.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where warnings otherwise correctly state the law and also state, “for those not driving a commercial motor vehicle at the time of arrest: if your driver’s license is suspended or revoked, your commercial driver’s license, if any, will be disqualified,” did the hearing examiner properly conclude that the warnings are not misleading as to the length of the CDL disqualification? [Assignment of Error 1]

2. If the warnings are misleading, did the hearing examiner properly hold that Martin failed to demonstrate that he was actually prejudiced by the misleading warnings? [Assignments of Error 2, 3]

3. Martin sought, and this Court granted, review of the superior court’s oral conclusion that WAC 308-103-070(10), which requires a hearing examiner to continue the hearing when a law enforcement officer subpoenaed by a CDL holder fails to appear, is neither ultra vires, unconstitutional, nor contrary to Washington law. The following issue pertains to an assignment of error that will be raised by Martin in his Response Brief.

Where WAC 308-103-070(1) allows a CDL holder to cross-examine the witness against him and results in no prejudice to the driver because his license remains valid until the Department issues a final order, and where there is no constitutional right to a “speedy trial” in the civil context, did the hearing examiner properly reset the hearing to allow Trooper Street to testify?

IV. STATEMENT OF THE CASE

A. The arrest and breath test procedure

Washington State Patrol Trooper Jeffrey Street arrested Martin for driving under the influence. CP at 45.¹ At the police station, Trooper Street read Martin the implied consent warnings from the form entitled, “Implied Consent Warning for Breath,” which states:

1. You are now advised that you have the right to refuse the breath test.
 - (a) Your driver’s license, permit or privilege to drive will be revoked or denied by the Department of Licensing for at least one year; and
 - (b) Your refusal to submit to this test may be used in a criminal trial.
2. You are further advised that if you submit to this breath test, and the test is administered, your driver’s license, permit or privilege to drive will be suspended, revoked or denied by the Department for at least ninety days if you are:
 - (a) Age 21 or over and the test indicates the alcohol concentration of your breath is .08 or more or you are in violation of RCW 46.61.502 driving under the influence, or RCW 46.61.504, physical control of a motor vehicle under the influence; or
 - (b) under age twenty-one and the test indicated the alcohol concentration of your breath is 0.02 or more, or you are in violation of RCW 46.62.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence.
3. If your driver’s license, permit or privilege to drive is suspended, revoked, or denied, you may be eligible to immediately apply for an ignition interlock driver’s license.

¹ Martin did not contest at the superior court that the officer had legitimate reasons to stop him and probable cause for the arrest.

4. You have the right to additional tests by any qualified person of your own choosing.

CP at 42 *See* Appendix A. Although not read aloud, the form also contained the following warning regarding a commercial driver's license:

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

CP at 42 . Martin did not express any confusion regarding the warnings, signed the acknowledgement, and agreed to submit to a breath test. CP at 42, 54. Martin submitted breath samples of 0.096 and 0.094. CP at 48.

Based on the results of the breath test, the Department notified Martin that his driver's license would be suspended for 90 days. CP at 89. The Department also informed him that as a result of his DUI arrest, his CDL would be disqualified for one year under RCW 46.25.090. CP at 100.

B. Administrative review proceedings

Through counsel, Martin requested a hearing to contest his license suspension. CP at 86 He requested that the hearing examiner issue a subpoena for Trooper Jeff Street. CP at 66–68. The hearing examiner issued the subpoena as requested, directing the trooper to appear for hearing on December 28, 2009, at 1:00 p.m. CP at 69–71.

On December 28, 2009, the hearing examiner convened a telephonic hearing at approximately 1:22 p.m. CP at 121-122. Trooper

Street did not appear. CP 121-122. Through counsel, Martin made an oral motion to dismiss the case. CP at 121-122. The hearing examiner orally granted the motion. CP at 121-122. At that time, neither Martin's counsel nor the hearing officer mentioned that Martin holds a CDL endorsement on his personal driver's license. Shortly thereafter on the same day, the hearing officer reconvened the telephonic hearing with Martin's counsel, vacated her oral dismissal order, and entered an order continuing the hearing to January 25, 2010, pursuant to WAC 308-103-070(10), which requires a hearing officer to continue a hearing when a subpoenaed law enforcement officer does not appear and the driver is a CDL holder. CP at 123-125. At 2:18 p.m., the hearing officer sent Martin's counsel a fax confirming that she was vacating the dismissal and rescheduling the hearing. CP. at 72.

The subsequent hearing occurred on January 25, 2010. Trooper Street appeared and testified, subject to cross-examination by Martin's counsel. CP at 127-134. Following the hearing, the hearing examiner issued an order upholding the Department's suspension. CP at 54-58. Martin's license was to be suspended effective February 12, 2010. CP at 53.

C. Judicial proceedings

On review, the superior court affirmed the hearing examiner's order continuing the hearing for the trooper to provide testimony and be

subject to cross-examination.² The superior court reversed the suspension order however, holding that the implied consent warnings provided to Martin were misleading. The Department moved this Court for discretionary review of the superior court's order holding that the implied consent warnings are misleading. This Court stayed action on the Department's motion pending the outcome of *Lynch v. Dep't of Licensing*, which presented the issue of whether the implied consent warnings are misleading to a CDL holder. Following the decision in *Lynch*, Martin cross-moved this Court for review of the superior court's order holding WAC 308-103-070(10) constitutional. In a ruling granting review in part, this Court granted the Department's motion and denied Martin's cross-motion. Martin moved to modify the Commissioner's ruling denying his cross-motion. On December 1, 2011, this Court granted Martin's motion.

V. STANDARD OF REVIEW

The applicable standard of review is noteworthy in this case because, though the Department is the appellant, Martin challenges the hearing examiner's order suspending his license on several grounds and carries the burden of demonstrating its invalidity. The Court of Appeals reviews the Department's decision from the same position as the superior

² The superior court judge indicated in his oral ruling that the hearing examiner did not err in reconvening the hearing, vacating her order of dismissal, and continuing the hearing to allow the trooper to appear. This element of the ruling is not reflected in the court's RALJ order. Because this Court sits in the same position as the superior court and directly reviews the Department's final order, and because this is not an error asserted by the Department, the Department did not arrange for the transcription of a verbatim report of proceedings pursuant to RAP 9.2(a). Martin also did not provide a verbatim report of proceedings.

court. *Clement v. Dep't of Licensing*, 109 Wn. App. 371, 373, 35 P.3d 1171 (2001).

The implied consent statute, RCW 46.20.308, governs judicial review of the Department's license revocation order. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 48, 50 P.3d 627 (2002). If a person's license suspension, revocation or denial is sustained at an administrative hearing, he has the right to appeal that decision to the superior court. RCW 46.20.308(9). Under RCW 46.20.308(9):

The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) that were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department.

Therefore, the Court of Appeals reviews the administrative order to determine whether the Department has committed any errors of law, upholding findings of fact supported by substantial evidence in the record. *See* RCW 46.20.308(9); *Clement*, 109 Wn. App. at 374.

VI. SUMMARY OF ARGUMENT

The warnings provided to Martin—the statutorily required implied consent warnings plus additional, legally accurate information about his CDL—were not misleading and did not prevent him from making a knowing and intelligent decision regarding whether to consent to or refuse the breath test. The warning that his CDL would be disqualified if his

license were suspended or revoked was legally accurate. The arresting trooper properly provided the additional information to Martin and was not required to tell him the length of the CDL disqualification. The warning does not suggest anything about the length of CDL disqualification, much less that it is dependent upon the length of driver's license suspension or revocation. As in *Lynch*,³ recently decided by this court, Martin received the statutorily required warnings and accurate additional information and did not demonstrate actual prejudice from any allegedly misleading warnings. The hearing examiner's decision suspending his license was correct and should be affirmed.

Additionally, WAC 308-103-070(10) requires a hearing examiner to continue an implied consent hearing when a duly subpoenaed law enforcement officer fails to appear for the hearing of a driver who holds a CDL. This provision properly observes the driver's due process rights, affording him or her the opportunity to cross-examine a witness on whose sworn declaration the Department intends to rely. The facts here are distinguishable from the cases on which Martin relies because, in contrast to the drivers there, in this administrative hearing he actually cross-examined the arresting trooper during his hearing. Also, the continuance did not prejudice Martin because the license suspension did not go into effect while the hearing was pending. Thus, the Court should uphold

³A copy of this decision is attached Appendix B.

WAC 308-103-070(1), reverse the order of the superior court, and affirm the hearing examiner's order suspending Martin's driver's license

VII. ARGUMENT

This Court should affirm the Department's orders suspending Martin's personal driver's license because the implied consent warnings are not misleading, the superior court's order conflicts with decisions of the supreme court and court of appeals, and WAC 308-108-070(10) is neither ultra vires, unconstitutional, nor contrary to Washington law.

A. The Department properly suspended Martin's license because the implied consent warnings provided to him are not inaccurate or misleading.

The warnings provided to Martin were those statutorily required implied consent warnings plus additional, legally accurate information about his CDL. As Division II found in *Lynch*, the warnings were not misleading because they afforded him, a person of normal intelligence, the opportunity to make a knowing and intelligent decision regarding whether to consent to a breath test.

The implied consent statute was enacted (1) to discourage persons from driving motor vehicles while under the influence of alcohol or drugs; (2) to remove the driving privileges of those persons disposed to driving while intoxicated; and (3) to provide an efficient means of gathering reliable evidence of intoxication or non-intoxication. *Cannon*, 147 Wn.2d at 47. The law provides that a person who drives in this state is considered to have consented to a test to determine the alcohol content of that

person's blood or breath if arrested for suspicion of driving under the influence of intoxicating liquor or any drugs. *Id.* Prior to administering the test, the statute mandates that the arresting officer warn the driver of certain consequences that flow from either blowing over the legal limit or refusing to take the test altogether. RCW 46.20.308(2)(a)-(c). Specifically, the officer must warn the driver (1) that if he or she refuses the test, the driver's license or privilege to drive will be revoked or denied for at least one year, (2) that evidence of refusal may be used in a criminal trial, (3) that if the driver submits to the test with a result over .08, his or her driver's license will be suspended for at least 90 days, and (4) that if the driver's privilege to drive is suspended or revoked, he or she can immediately apply for an ignition interlock device. RCW 46.20.308(2)(a)-(d).

The purpose of the warnings is to provide the driver with the opportunity to make a knowing and intelligent decision regarding whether to refuse a breath test: that is, whether to withdraw consent and what will result if the test is refused. *State v. Bostrom*, 127 Wn.2d 580, 588, 902 P.2d 157 (1995). "The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." *Id.* at 590. As long as the opportunity to make a knowing and intelligent decision is provided, it need not be shown the driver actually understood the warnings, or that his or her decision was actually knowingly and intelligently made. *Jury v. Dep't of Licensing*, 114 Wn. App. 726, 732, 60 P.3d 615 (2002).

After Martin was arrested for suspicion of driving under the influence, the trooper provided him the warnings set forth in statute as well as additional accurate information regarding disqualification of his CDL. Martin claims that the additional, accurate warning regarding the consequences to his CDL was misleading as to the length of time his CDL would be penalized.

1. This Court has already decided the warnings are not misleading.

Martin's argument that the warnings are misleading was recently rejected by this court in *Lynch*. There, this Court stated:

Lynch argues that the warnings she received falsely encouraged her to submit to the breath test by implying that her CDL would be disqualified for the same period as her personal driver's license suspension or revocation, namely, 90 days if she failed the breath test and one year if she refused to take the test. Lynch points out that under RCW 46.25.090, a driver's CDL is disqualified for "not less than one year" if the driver fails the breath test or refuses to take the test. But we disagree with Lynch because the warnings provided did not state the duration of her CDL disqualification and did not imply that such disqualification would be for the same period of time as her driver's license suspension.

The statement provided to Lynch concerning potential CDL disqualification followed the required implied consent warnings, identifying it as an additional consequence of having her personal driver's license either suspended or revoked. The warning Lynch received was an accurate statement of the law concerning CDL disqualification. And the CDL notification referred to CDL "disqualification" as opposed to personal driver's license "suspension or revocation," correctly implying that it is a separate

consequence. The warnings provided were not confusing or overly wordy but, rather, added to Lynch's body of knowledge to use in deciding whether to take the breath test or refuse it.

We hold that a person of normal intelligence, if provided the warnings read to Lynch, would not be led to believe either that the CDL disqualification . . . would last only as long as the driver's license suspension or revocation. The warnings permitted Lynch to ask for further details, which she declined to do.

Lynch, 163 Wn. App. at 709.

The facts here are the same as those in *Lynch*. Both drivers held CDLs and were arrested for driving under the influence in their personal vehicles. Both drivers were read the same implied consent warnings, they expressed no confusion about those warnings and they took the breath test. This Court should similarly hold that the warnings are not inherently misleading but rather added to Martin's "body of knowledge" to use in deciding whether to take or refuse the breath test.

2. When read together, the warnings are not misleading as to the length of disqualification for the CDL.

Lynch controls and there is no reason for this Court to overrule itself. The warnings provided to Martin, just as in *Lynch*, advised him of the required implied consent warnings and that his CDL endorsement would be disqualified if his driver's license was suspended or revoked. Though not required by statute, this warning was legally accurate and did

not deprive him of the opportunity to make a knowing and intelligent decision about whether to take the breath test.

Providing information in addition to what the implied consent statute requires does not contravene the purpose of the warnings if they are accurate and not misleading. *Moffitt v. City of Bellevue*, 87 Wn. App. 144, 148, 940 P.2d 695 (1997). Additional or different language is not misleading if it does not convey a different meaning than that specified in the statute. *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785, 831 P.2d 149 (1992). The warnings, when provided to a driver in substantially the same language set out in the statute, permit someone of normal intelligence the opportunity to make a knowing and intelligent decision whether to submit or refuse the evidential breath test. *Bostrom*, 127 Wn.2d at 586.

Additionally, the warnings provided to Martin informed him that his personal driver's license would be "suspended," "revoked," or "denied," but that his CDL would be "disqualified." The CDL warning explains that the effect of the driver's personal license being suspended or revoked is that his CDL license will be "disqualified." The "disqualification" language (as distinguished from "suspended or revoked"), used in both the CDL statute and the CDL warning, is a special term that refers only to sanctions against a commercial motor vehicle

license. RCW 46.25.010(8).⁴ This does not imply or convey any information regarding the length of the disqualification.

Moreover, stating that the CDL would be disqualified distinguishes that action from suspension or revocation of a driver's license, for which the warnings do identify time periods. Disqualify means "1: to deprive of qualities, properties, or conditions necessary for a purpose: make unfit 2: to deprive of a power, right, or privilege: ." Webster's Third New International Dictionary of the English Language 2481 (2002). The term "disqualified" indicates something more permanent than suspended. Its use alerts the driver that the warning regarding the CDL is different than the personal license warning, which provides that the Department may "suspend," "revoke," or "deny," the individual's driver's license. The consequence to the CDL is thus textually distinguished from the consequence to the personal license and, as the court in *Lynch* stated, correctly implies that it is a separate consequence. *Lynch*, 163 Wn. App. at 709.

3. The warnings accurately state the law.

Courts have found that adding language to the warnings, beyond what is in the statute, can be misleading and invalid if the additional

⁴ The term is drawn from federal statutes and regulations that specify a mandatory minimum penalty schedule. 49 U.S.C. § 31310, 31311(a)(3), (13), (15), (20); 49 CFR 383.51 Table 1 (mandatory one year disqualification for refusal or for DUI conviction while in any vehicle.) State compliance with the penalty schedule is mandatory, and overseen by the Federal Motor Carrier Safety Administration of the U.S. Dep't of Transportation. 49 U.S.C. § 31311(a); 49 CFR § 384.301. A state's failure to comply with the federal disqualification schedule can result in the withholding of highway funds. 49 CFR § 384.401.

language includes *incorrect statements of law*. Where warnings provided to a driver have been more specific than the warnings provided in the statute, they have been upheld so long as they provide accurate information.

Martin's argument is similar to the argument regarding the placement of a semicolon in the otherwise accurate and legally correct implied consent warnings, which was rejected by the court in *Jury*, 114 Wn. App. at 733.

In *Jury*, the drivers were informed:

You are further advised that your license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of your breath is 0.08 or more, if you are age 21 or over, or 0.02 or more if you are under age 21; or if you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504.

Id. at 730. The drivers argued "that the phrase set off by the semicolon did not relate strictly to those under 21 as the statute intended;" therefore it related to everybody and they stood to lose their licenses regardless of their breath test results. *Id.* However, the court pointed out that the warnings "correctly warn people of any age faced with making the decision of whether to submit to a breath test that if convicted under RCW 46.61.502 or 46.61.504 their license will be suspended, revoked or denied." *Id.* at 733. The law provides for mandatory suspension or denial of the driving privilege when someone is convicted of violating

RCW 46.61.502, 46.61.503, or 46.61.504. Therefore, regardless of the positioning of the semicolon, the warnings provided an accurate statement of the law and therefore were not misleading. *Jury*, 114 Wn. App. at 733.

In Martin's case, the warnings correctly advised him of what is mandatory under the law. Specifically, that if his personal license is suspended or revoked under RCW 46.20.308, then his CDL will also be disqualified. Just as in *Jury*, there is nothing misleading or inaccurate about this additional information stating what is mandatory under the law.

In contrast, in *Cooper v. Dep't of Licensing*, the driver was informed that if he refused to take a breath test, his driver's license would be revoked "probably for at least a year, depending upon his driver record, maybe two." *Cooper v. Dep't of Licensing*, 61 Wn. App. 525, 527, 810 P.2d 1385 (1991). This was an incorrect statement of law. *Id.* A driver's license *will* be revoked or denied for at least one year if he or she refuses the breath test. RCW 46.20.3101(1); RCW 46.20.308(2)(a). Division III found that the warning given to Cooper was legally incorrect and inaccurate because it implied that Mr. Cooper might have his license revoked for less than one year when it was an "absolute certainty" that if Mr. Cooper refused, he would lose his license for a minimum of one year. *Id.* at 528.

In another case, the officers informed the drivers that they could obtain an additional test "at their own expense." *State v. Bartels*, 112 Wn.2d 882, 884, 774 P.2d 1183 (1989). This language was not authorized by statute and did not accurately describe an indigent defendant's right to

obtain reimbursement for the cost of an additional test. *Bartels*, 112 Wn.2d. at 887. Again, because the additional language was an incorrect statement of law, the court found that it prevented the driver from making a properly informed decision whether or not to submit to a blood alcohol content test. *Id.* at 889. The court found that the warning was “less accurate than saying nothing on the proposition.” *Id.* at 888.

Martin asks this Court to go further than courts have been willing to go—indeed, further than the Court was willing to go in *Lynch*—and find that warnings that accurately state the law are nevertheless misleading. *Lynch*, 163 Wn. App. 697. In the present case, the warning regarding the CDL disqualification was legally correct. Accordingly, the Court should hold that it was not misleading.

4. The CDL language does not change the meaning of the statute.

The Washington Supreme Court has found a warning was misleading where the language changed the warning’s meaning. *State v. Whitman Cnty Dist. Court*, 105 Wn.2d 278, 714 P.2d 1183 (1986). In *Whitman County*, drivers were advised that their refusal to submit to a breath test “*shall* be used against you in a subsequent criminal trial.” *Id.* at 280. However, refusal evidence is admissible only under limited circumstances, and the implied consent statute requires officers to warn drivers that their refusal to take the test *may* be used against them in any subsequent criminal trial. RCW 46.20.308(1); *Id.* at 285. The court concluded, therefore, that the “change in wording operated to convey a

different meaning than that specified in the statute. . . . with regard to the frequency or probability that those negative consequences will follow.” *Whitman Cnty*, 105 Wn.2d. at 285-86.

In contrast here, the CDL warning does not change the meaning of the negative consequences that flow from either refusal to take the breath test or blowing over the legal limit. The CDL language simply clarifies that if the driver’s personal license is suspended or revoked, there will be consequences to his or her CDL.

Like *Lynch*, Martin cannot demonstrate that people of normal intelligence would be misled into taking or refusing the breath test because they are informed that their CDL will be disqualified if their personal license is suspended or revoked. The fact that Martin was not told how long the disqualification would last did not make the warnings misleading or invalid. In addition to the fact that the language is accurate as written, police officers are not required to inform drivers of *all* consequences that will flow from refusing or submitting to a breath test. *Bostrom*, 127 Wn.2d at 586. Nor are police officers required to tailor the warnings to every driver stopped. *Jury*, 114 Wn. App. at 734. The hearing officer’s decision is thus consistent with both *Bostrom* and *Jury*. Because Martin was afforded an opportunity to make a knowing and intelligent decision whether to take or refuse the breath test, the suspension of his license should be affirmed.

B. Even assuming *arguendo* that the warnings are misleading, Martin did not demonstrate at the administrative hearing that he was actually prejudiced by them.

Even if a warning is misleading as a matter of law, a driver still must demonstrate that he was actually prejudiced by the warning in order to obtain a reversal of the Department's action. *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989). Because the implied consent warnings are not misleading, this Court does not have to reach the prejudice prong; however, if this Court does find they were misleading, it should still affirm the Department's order because Martin failed to demonstrate the actual prejudice required for him to prevail.

Although case law regarding what is necessary to demonstrate prejudice is somewhat unclear, contrary to Martin's argument to the superior court, Washington courts do not merely consider whether a driver falls into a particular "class of persons" who *could* be prejudiced when determining whether prejudice has been established. Rather, courts look to whether the driver has established actual prejudice as a result of the allegedly misleading advisement. *Gonzales*, 112 Wn.2d at 901.

In *Gonzales*, the Court held that drivers need to show actual prejudice from having been given inaccurate or misleading implied consent warnings in order to have their license revocations reversed. *Id.* at 899. The drivers in that case were told they had the right to an additional breath test "at your own expense and that your refusal to take the test shall be used against you in a subsequent criminal trial" *Id.* at 892-93. The "at your own expense" language was not part of the statute. *Id.*

Additionally, the warnings given advised that refusal to take a breath test “shall” be used in a criminal trial, while the statute used the permissive word “may.” Both drivers refused the breath test.

With respect to the “at your own expense” language, the court found that such language could possibly be misleading to indigent drivers, since for such drivers court rules provided for reimbursement of the costs of obtaining an additional test. *Gonzales*, 112 Wn.2d. at 898-99. Nonetheless, the court determined that since the drivers in question had not established indigency, the “at your own expense” language could not have influenced their decision. *Id.* at 899. Because actual prejudice was not shown, the inaccurate and therefore misleading warning did not invalidate the revocation of the licenses. *Id.* at 895.

With respect to the warning advising that refusal to take a breath test “shall,” rather than “may,” be used in a criminal trial, the court acknowledged that the incorrect mandatory language could mislead a driver into *taking* the test. *Id.* at 902. However, since the driver did *not* take the test, “he could not have been prejudiced by the inaccurate warning and that warning thus does not serve as a basis to invalidate the revocation of his driver’s license.” *Id.*

The same inaccurate warning was provided to the driver in *Graham v. Dep’t of Licensing*, 56 Wn. App. 677, 784 P.2d 1295 (1990). The driver in *Graham* “argued that the improper language [regarding the expense of additional tests] created a ‘chilling effect’ on her decision whether to take the breath test.” *Id.* at 680. Stating that the question of

actual prejudice is a factual one, the court remanded the case for the driver to establish indigency at the time she refused the test. *Graham*, 56 Wn. App. at 681. Notably, the court placed the burden on the driver to establish actual prejudice. *See Gahagan v. Dep't of Licensing*, 59 Wn. App. 703, 706-07 n.1 (citing *Graham*, 56 Wn. App. at 681), 800 P.2d 844 (1990).

Here, Martin chose to take the breath test, and, unlike the driver in *Graham*, he did not assert that the CDL warning actually influenced his decision. Although case law does not specifically address what constitutes actual prejudice, a logical conclusion is that Martin must first demonstrate that he actually was misled by the warnings. Second, he must demonstrate through evidence that had he been differently advised and, as a result, refused to take the test, the consequences would have been different. But in this case, Martin provided no evidence or testimony that he actually misunderstood the warnings and that his misunderstanding actually influenced his decision. And his refusal to take the test would have carried the same consequences: a one year disqualification of his CDL.

Martin did not testify that he submitted to the breath test because he believed that his CDL would be disqualified for only 90 days if he blew over the legal limit. Martin also failed to establish that he falls within the class of persons that would be affected by the warnings *and* that, by virtue of his membership in that class, his ability to make a knowing and intelligent decision was affected such that a different decision could have changed the outcome of his case. *See Gonzales*, 112 Wn.2d at 902.

Martin's reliance at the superior court on dicta from a footnote in *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 792, 982 P.2d 601 (1999), is not persuasive. *Thompson* was decided purely on the question of whether the superior court had properly applied the doctrine of collateral estoppel in holding that the Department of Licensing should have suppressed the breath test after a district court did the same. *Id.* This Court was not persuaded by the *Thompson* dicta in *Lynch* and the facts here should lead to no different conclusion.

C. The hearing examiner's order continuing the administrative hearing to allow the subpoenaed trooper to appear honored Martin's due process rights because it allowed him to confront a witness against him.

Martin cited no authority for the proposition that a continuance of the hearing pursuant to WAC 308-103-070(10) violated due process. Martin's hearing properly observed his due process rights, including the right to cross-examine witnesses against him. *See Lytle v. Dep't of Licensing*, 94 Wn. App. 357, 361, 971 P.2d 969 (1999). The hearing officer continued Martin's hearing to contest his license suspension for the purpose of allowing the trooper—upon whose sworn report the Department intended to rely—to appear. The trooper did appear telephonically at the subsequent hearing, and Martin's attorney subjected him to cross-examination. This satisfied Martin's right to cross-examine the witness testifying against him. *See Id. at 361.*

While the “[r]evocation of a driver’s license for a statutorily defined cause implicates a protectable property interest that must comply

with due process,” *id.*, that does not include the constitutional right to a speedy trial. U.S. Const. amend. VI; Const. art. I, § 22. That constitutional right is afforded to criminal defendants only. *Id.* The due process rights of an administrative license suspension hearing includes the right to confront witnesses. *Flory v. Dep’t of Motor Vehicles*, 84 Wn.2d 568, 571–72, 527 P.2d 1318 (1974). Martin was afforded and exercised this right.

Drivers in license suspension hearings have the right to cross-examine witnesses testifying against them. In *Lytle*, the driver requested a hearing and asked the Department to subpoena the three officers involved in his arrest for suspicion of driving under the influence. *Lytle*, 94 Wn. App. at 359. For various reasons, none of the officers appeared at the driver’s hearing. The driver unsuccessfully moved for dismissal based on the unavailability of the officers. The hearing examiner, based on the certified written reports of the officers, sustained the Department’s revocation decision. *Id.* at 360. The Court reversed, holding that the driver was entitled to cross-examine the officers who provided evidence against him. Because he was not able to do so, despite his request that they appear, the hearing violated the driver’s due process rights. *Id.* at 362–63.

In contrast here, the hearing examiner’s order continuing the matter allowed Martin to cross-examine the trooper, on whose sworn report the Department relied. This provided Martin exactly what he had requested: the opportunity to cross-examine the individual on whose

testimony the Department relied to suspend his driver's license. CP at 127-134.

Additionally, Martin argued at the superior court that the order continuing the hearing and WAC 308-103-070(10), which required the continuance, deprived him of a critical constitutional right. But Martin failed to articulate which right has been abridged because he was in fact given the opportunity to cross-examine the witness testifying against him. He does not point to any authority—certainly not the federal or state constitution—that grants him the right to dismissal of his license suspension if a subpoenaed officer fails to appear for an initial hearing. The authorities only require that he be given the opportunity to cross-examine the witnesses against him. *See Lyle*, 94 Wn. App. at 362–63; *Flory*, 84 Wn.2d at 571–72; *see also Mansour v. King Cy.*, 131 Wn. App. 255, 269–70, 128 P.3d 1241 (2006). He had this opportunity when the evidentiary hearing convened on January 25, 2010. CP at 127-134.

Martin's reliance on *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 605 P.2d 1265 (1980), is misplaced. There, a criminal defendant appeared for trial, but a duly subpoenaed witness for the prosecution failed to appear. The court did not dismiss the criminal case based a vague due process challenge but rather based on a court rule, Justice Court Criminal Rule 3.08, which provided: "Continuances may be granted to either party for good cause shown. . . . If the defendant is not brought to trial within 60 days . . . , the court shall order the complaint to be dismissed, unless good

cause to the contrary is shown,” JCrR 3.08. *Nugent*, 93 Wn.2d at 83. The *Nugent* court held that under JCrR 3.08, good cause was required to continue a hearing for a party’s witness to appear, and that dismissal was the proper remedy in the absence of good cause. *Id.* Unlike in *Nugent*, here there is no statute, regulation, or court rule requiring good cause for a continuance in these circumstances. Rather, WAC 308-103-070(10) mandates the continuance.⁵

Here, the superior court properly held that continuing the hearing did not violate Martin’s right to confront witnesses or any other constitutional right.

D. WAC 308-103-070(10) is permissible under constitutional guarantees of equal protection because there is a rational basis for its different treatment of commercial driver’s license holders, and such licensees are not a protected class.

Martin may argue, like he did at superior court, that WAC 308-103-070(10) violates equal protection. While subsection (10) treats commercial drivers differently from holders of personal driver’s licenses, there is a rational basis for doing so: commercial drivers are authorized to drive very large vehicles that can pose a significant public safety risk if not operated safely. *See Merseal v. Dep’t of Licensing*, 99 Wn. App. 414, 421, 994 P.2d 262 (2000)⁶. Ensuring that a hearing involving such a

⁵ Additionally, any speedy trial principles that were at play in *Nugent* do not apply in the administrative setting. *See* Const. art. 1, § 22.

⁶ Mr. Merseal was arrested for driving a commercial motor vehicle under the influence of alcohol. Merseal argued the disparate treatment between commercial drivers and private drivers, who could receive occupational licenses and request stays in superior court, violated his right to equal protection. *Merseal*, 99 Wn. App. at 416..

licensee occurs and is not dismissed due to the arresting officer's failure to appear for the hearing serves an important interest: ensuring that CDL holders stopped for DUI do not escape sanction because of the arresting officer's scheduling conflict. In light of this rational basis, the regulation does not violate constitutional guarantees of equal protection.

The right to equal protection of laws is guaranteed by the Fourteenth Amendment of the United States Constitution and by the privileges and immunities clause of article I, section 12 of the Washington Constitution. There is a presumption in favor of constitutionality of a statute or statutory scheme. *Charron v. Miyahara*, 90 Wn. App. 324, 328, 950 P.2d 532 (1998). There are three levels of scrutiny in an equal protection claim, and minimum scrutiny applies the rational basis test when the classification involves neither a suspect or semi-suspect class nor threatens a fundamental or important right. *Merseal*, 99 Wn. App. at 420. "Under this inquiry, the classification is upheld unless [it] rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004).

Application of the rational basis test to CDL holders is proper. In *Merseal*, the court of appeals applied the rational basis test where it found there is no fundamental right or suspect class at issue in the disqualification of a commercial driver's license. *Merseal*, 99 Wn. App. at 420. Reasoning that because "operating a commercial vehicle on public highways is a privilege; it is not a right," the court explained that the classification between private and commercial drivers is upheld if the

government points only to a rational relationship between the classification and the legislative purpose. *Merseal*, 99 Wn. App. at 421. Notably, the *Merseal* court did not hold that commercial drivers are entitled to enhanced procedural due process under 46.20.308. On the contrary, it stated that public safety is a sufficient basis for distinguishing between commercial drivers and the general public. *Id.* at 422. The court in *Merseal* did not grant any additional due process rights than those that are specifically contained within the statute. Instead, the court held that disqualification of a commercial driver's license for driving while intoxicated under RCW 46.25 is rationally related to furthering the legitimate public interest in protecting the public. *Merseal*, 99 Wn. App. at 422.

Here, the government has the same interest in public safety on public highways. Public safety is a sufficient and rational basis for distinguishing between commercial drivers and the general public. Under RCW 46.01.110, the Department of Licensing is authorized to adopt and enforce rules to carry out the provisions relating to vehicle licenses. The challenged regulation, WAC 308-103-070(10), governs continuances of hearings conducted pursuant to the implied consent statute, RCW 46.20.308, as well as the commercial driver's statute, RCW 46.25.120. Martin does not assert that there is no basis to distinguish between commercial and private drivers. Instead, he only challenges the rational basis of the purpose of the WAC. The government has a legitimate interest in protecting the public from commercial vehicles

operated by drivers under the influence of alcohol. Accordingly, it is rational for the Department to provide extra procedural safeguards that work against allowing a license suspension action involving a commercial driver to be dismissed prior to consideration of the merits of the case. Requiring the additional procedural step of continuing a hearing when a subpoenaed officer has not appeared is rationally related to the purpose of “protecting the public from commercial rigs operated by alcohol-impaired drivers.” *Merseal*, 99 Wn. App. at 422.

The Department has not deprived a commercial driver from the right to confront witnesses through this regulation. Indeed, the WAC ensures a later hearing wherein the officer may appear and the driver may in fact cross-examine the officer. As such, this code actually affords enhanced due process protections to provide a greater likelihood of reaching the correct result after the driver’s opportunity to confront witnesses and the evidence against him. Because WAC 308-103-070(10) is constitutional and violates neither due process nor equal protection guarantees, this Court should affirm the Department’s order of suspension.

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VIII. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court reverse the decision of the superior court, thereby affirming the hearing examiner's suspension order.

RESPECTFULLY SUBMITTED this 17th day of March, 2012.

ROBERT M. MCKENNA
Attorney General



TONI M. HOOD, WSBA # 26473
Assistant Attorney General
Attorneys for Respondent

APPENDIX A

WASHINGTON STATE
DUI ARREST REPORT

CASE / CITATION NUMBER

946212513

IMPLIED CONSENT WARNING FOR BREATH

WARNING! YOU ARE UNDER ARREST FOR:
(check appropriate box(es))

- ☒ RCW 46.61.502 OR RCW 46.61.504: Driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.
- ☐ RCW 46.61.503: Being under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol.
- ☐ RCW 46.25.110: Driving a commercial motor vehicle while having alcohol in your system.

FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION.

- YOU ARE NOW ADVISED THAT YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE:
 - YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE REVOKED OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST ONE YEAR; AND
 - YOUR REFUSAL TO SUBMIT TO THIS TEST MAY BE USED IN A CRIMINAL TRIAL.
- YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST, AND THE TEST IS ADMINISTERED, YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE SUSPENDED, REVOKED, OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST NINETY DAYS IF YOU ARE:
 - AGE TWENTY-ONE OR OVER AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.08 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE; OR
 - UNDER AGE TWENTY-ONE AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.02 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE.
- IF YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE IS SUSPENDED, REVOKED, OR DENIED, YOU MAY BE ELIGIBLE TO IMMEDIATELY APPLY FOR AN IGNITION INTERLOCK DRIVER'S LICENSE.
- YOU HAVE THE RIGHT TO ADDITIONAL TESTS ADMINISTERED BY ANY QUALIFIED PERSON OF YOUR OWN CHOOSING.

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

FOR THOSE DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOU EITHER (A) REFUSE THIS TEST OR (B) SUBMIT TO THIS TEST AND THE TEST INDICATES AN ALCOHOL CONCENTRATION OF 0.04 OR MORE, YOU WILL BE DISQUALIFIED BY THE DEPARTMENT OF LICENSING FROM DRIVING A COMMERCIAL MOTOR VEHICLE.

I HAVE READ THE ABOVE STATEMENT TO THE SUBJECT

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENT(S).

OFFICER'S SIGNATURE

SUBJECT'S SIGNATURE

DATE / TIME

LOCATION

WILL YOU NOW SUBMIT TO A BREATH TEST?

☒ YES ☐ NO

Did subject express any confusion regarding the implied consent warnings? If yes, explain below:

☐ YES ☒ NO

<input checked="" type="checkbox"/> At the time of this test(s), I was certified to operate the BAC DATAMASTER, the BAC DATAMASTER CDM, and PBT and possessed a valid permit issued by the State Toxicologist.			
DO YOU HAVE ANY FOREIGN SUBSTANCE IN YOUR MOUTH?	MOUTH CHECKED TIME? 1845	2 ND MOUTH CHECK? (If Necessary) TIME? 1910	ANY FOREIGN SUBSTANCES FOUND? EXPLAIN:
<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
OBSERVED: I observed the subject from the time of the mouth check through the completion of the breath test.			
<input checked="" type="checkbox"/> The subject did not vomit, eat, drink, smoke, or place any foreign substance in his/her mouth during the observation time.			
<input checked="" type="checkbox"/> I performed the PBT test in accordance with the State Toxicologist's protocols (Chapter 448-15 WAC)			PBT READING 1.02
			PBT TIME 1823
<input checked="" type="checkbox"/> BOOKED <input type="checkbox"/> RELEASED TO: PRD			

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APPENDIX B

Westlaw

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H

Court of Appeals of Washington,
 Division 2.
 Leesa Marie LYNCH, Respondent,
 v.

STATE of Washington, DEPARTMENT OF LI-
 CENSING, Appellant.

No. 40041-3-II.

July 19, 2011.

Publication Ordered Aug. 14, 2011.

Background: Driver sought review of decision of the Department of Licensing, suspending her driver's license and disqualifying her commercial driver's license (CDL). The Superior Court, Pierce County, Frank E. Cuthbertson, J., reversed. State appealed.

Holdings: The Court of Appeals, Van Deren, J., held that:

(1) implied consent warnings were not rendered inaccurate or misleading by inclusion of statement concerning potential CDL disqualification, and
 (2) implied consent warnings that were neither inaccurate nor misleading did not result in prejudice to driver.

Department's orders affirmed.

West Headnotes

[1] **Automobiles 48A** ➞ 144.2(4)

48A Automobiles

48AIV License and Regulation of Chauffeurs or Operators

48Ak144 Suspension or Revocation of License

48Ak144.2 Procedure

48Ak144.2(2) Judicial Remedies and Review in General

48Ak144.2(4) k. Trial de novo and determination. Most Cited Cases

The validity of implied consent warnings is a question of law reviewed de novo. West's RCWA 46.20.308.

[2] **Automobiles 48A** ➞ 144.1(1.11)

48A Automobiles

48AIV License and Regulation of Chauffeurs or Operators

48Ak144 Suspension or Revocation of License

48Ak144.1 In General; Grounds

48Ak144.1(1.10) Intoxication; Implied Consent

48Ak144.1(1.11) k. In general. Most Cited Cases

Automobiles 48A ➞ 418

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak417 Grounds for Test

48Ak418 k. Consent, express or implied. Most Cited Cases

Implied consent statute was enacted (1) to discourage persons from driving motor vehicles while under the influence of alcohol or drugs, (2) to remove the driving privileges of those persons disposed to driving while intoxicated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication. West's RCWA 46.20.308.

[3] **Automobiles 48A** ➞ 414

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak414 k. Right to take sample or conduct test; initiating procedure. Most Cited Cases

Automobiles 48A ➞ 418

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak417 Grounds for Test

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48Ak418 k. Consent, express or implied.
 Most Cited Cases

Under implied consent statute, drivers are presumed to have consented to a breath or blood test to determine alcohol concentration if arrested for driving under the influence of alcohol (DUI), but drivers may refuse the test; the choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace. West's RCWA 46.20.308(1).

[4] Automobiles 48A ⚡421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Courts review the implied consent warnings the arresting officer provided to ensure that the officer provided all the required warnings and that they were not inaccurate or misleading. West's RCWA 46.20.308.

[5] Automobiles 48A ⚡421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Implied consent warnings given by arresting officer must permit someone of normal intelligence to understand the consequences of his or her actions. West's RCWA 46.20.308.

[6] Automobiles 48A ⚡421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

The result of a breath test must be suppressed under implied consent statute if (1) the inaccurate warning deprives the driver of the opportunity to make a knowing and intelligent decision, and (2) the driver demonstrates that she was actually prejudiced by the inaccurate warning. West's RCWA

46.20.308(2).

[7] Automobiles 48A ⚡418

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak417 Grounds for Test

48Ak418 k. Consent, express or implied.
 Most Cited Cases

Automobiles 48A ⚡421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Under implied consent statute, an arresting officer need not ensure that the driver does in fact make a knowing and intelligent decision regarding whether to refuse the test; the driver only needs to have the opportunity to exercise informed judgment. West's RCWA 46.20.308.

[8] Automobiles 48A ⚡421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Proper opportunity for driver to exercise informed judgment under implied consent statute is provided when, before being asked to submit to a breath or blood test, the officer informs the driver of the rights and consequences under the statute; the exact words of the implied consent statute are not required, so long as the meaning implied or conveyed is not different from that required by the statute. West's RCWA 46.20.308.

[9] Automobiles 48A ⚡421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

A warning, either in general language or in statutory terms, which neither misleads nor is inac-

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curate and which permits the driver to make inquiries for further details is adequate to provide opportunity for driver to exercise informed judgment under implied consent statute. West's RCWA 46.20.308.

[10] Automobiles 48A ⚡ 421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Implied consent warnings given to driver were not rendered inaccurate or misleading by inclusion of statement concerning potential commercial driver's license (CDL) disqualification, notwithstanding driver's claim that statement falsely implied that CDL disqualification would be for the same period as her personal driver's license suspension or revocation, namely, 90 days if she failed the breath test and one year if she refused to take the test; CDL notification referred to CDL "disqualification" as opposed to personal driver's license "suspension or revocation," correctly implying that it was a separate consequence. West's RCWA 46.20.308, 46.25.090.

[11] Automobiles 48A ⚡ 144.2(3)

48A Automobiles

48AIV License and Regulation of Chauffeurs or Operators

48Ak144 Suspension or Revocation of License

48Ak144.2 Procedure

48Ak144.2(2) Judicial Remedies and Review in General

48Ak144.2(3) k. Scope of review; discretion and fact questions. Most Cited Cases

Automobiles 48A ⚡ 421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

The requirement of a showing of actual prejudice to the driver is appropriate in a civil action where the arresting officer has given all of the implied consent warnings, but merely failed to do so in a 100 percent accurate manner.

[12] Automobiles 48A ⚡ 144.2(3)

48A Automobiles

48AIV License and Regulation of Chauffeurs or Operators

48Ak144 Suspension or Revocation of License

48Ak144.2 Procedure

48Ak144.2(2) Judicial Remedies and Review in General

48Ak144.2(3) k. Scope of review; discretion and fact questions. Most Cited Cases

Automobiles 48A ⚡ 421

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Driver was not prejudiced in civil proceedings by officer's inclusion of statement concerning potential commercial driver's license (CDL) disqualification in implied consent warnings, where warnings were accurate and not misleading, and driver confirmed to the arresting officer that she understood the warnings.

[13] Automobiles 48A ⚡ 144.2(3)

48A Automobiles

48AIV License and Regulation of Chauffeurs or Operators

48Ak144 Suspension or Revocation of License

48Ak144.2 Procedure

48Ak144.2(2) Judicial Remedies and Review in General

48Ak144.2(3) k. Scope of review; discretion and fact questions. Most Cited Cases

Automobiles 48A ⚡ 421

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48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases

Implied consent warnings that are neither inaccurate nor misleading do not result in prejudice to the driver in civil proceedings. West's RCWA 46.20.308.

****66** Toni Marie Hood, Office of The Attorney General, Olympia, WA, for Appellant.

Barbara Ann Bowden, Law Office of Barbara Bowden, Lakewood, WA, Michael R. Frans, Law Office of Michael R. Frans, Burien, WA, for Respondent.

VAN DEREN, J.

***700** ¶ 1 The State appeals the trial court's order reversing the Washington State Department of Licensing's (Department) decision to suspend Leesa Marie Lynch's driver's license and disqualify her commercial driver's license (CDL). The State argues that the implied consent warnings Lynch received were accurate and not misleading, and that Lynch failed to prove that the warnings prejudiced her. We hold that the warnings were not inaccurate or misleading and that Lynch has not shown actual prejudice in this civil proceeding. We reverse the superior court and affirm the Department's suspension of Lynch's driver's license and disqualification of her CDL.

FACTS

¶ 2 In the early morning of March 27, 2009, Washington State Patrol Trooper John Garden arrested Lynch for driving her personal vehicle under the influence (DUI). At 2:33 am, Lynch volunteered to take a portable breath test (PBT) and blew a breath sample that measured her blood alcohol content (BAC) at 0.125.^{FN1} Lynch told Garden "she stopped by *701 a bar after work and had a couple drinks." Admin. Record (AR) at 51.

FN1. The portable breath test measures the

concentration of alcohol in a person's breath to determine their blood alcohol level and whether it is above the legal limit. See *State v. Robbins*, 138 Wash.2d 486, 492, 980 P.2d 725 (1999); *State v. Creditford*, 130 Wash.2d 747, 755–56, 766, 927 P.2d 1129 (1996). "When used to establish blood alcohol levels, breath testing devices use a mathematical constant to approximate the percentage of alcohol in the blood based on the amount of alcohol present in a breath sample." *State v. Brayman*, 110 Wash.2d 183, 187–88, 751 P.2d 294 (1988).

¶ 3 Garden placed Lynch in custody, informed her of her *Miranda*^{FN2} rights, and ****67** transported her to the Sumner Police Department. At the police station, Garden read Lynch the implied consent warnings regarding taking the BAC tests that stated:

FN2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Warning! You are under arrest for:

...

RCW 46.61.502 or RCW 46.61.504: Driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.

....

Further, you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently, to determine alcohol concentration.

1. You are now advised that you have the right to refuse this breath test; and that if you refuse:

(a) Your driver's license, permit, or privilege to drive will be revoked or denied by the [D]epartment ... for at least one year; and

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(b) Your refusal to submit to this test may be used in a criminal trial.

2. You are further advised that if you submit to this breath test, and the test is administered, your driver's license, permit, or privilege to drive will be suspended, revoked, or denied by the [D]epartment ... for at least ninety days if you are:

(a) Age twenty-one or over and the test indicates the alcohol concentration of your breath is 0.08 or more, or *702 you are in violation of RCW 46.61.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence; or

(b) Under age twenty-one and the test indicates the alcohol concentration of your breath is 0.02 or more, or you are in violation of RCW 46.61.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence.

3. If your driver's license, permit, or privilege to drive is suspended, revoked, or denied, you may be eligible to immediately apply for an ignition interlock driver's license.

4. You have the right to additional tests administered by any qualified person of your own choosing.

For those not driving a commercial motor vehicle at the time of arrest: If your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified.

AR at 46 (capitalization omitted). Lynch was unable to sign the implied consent warnings form because she was handcuffed, but she confirmed to Garden that she "acknowledge[d] and understood" the warnings and agreed to give two breath samples. AR at 46. Garden then administered two BAC DataMaster tests that measured Lynch's breath alcohol level at 0.110 and 0.120.

¶ 4 On April 7, the Department mailed Lynch (1) an "order of suspension" informing her that her "driving privilege w[ould] be suspended for 90 days on May 27, 2009, at 12:01 a.m., for being in physical control or driving under the influence of alcohol," in violation of RCW 46.20.3101,^{FN3} and (2) a "notice of disqualification," informing her that her *703 CDL would be disqualified on May 27 for one year under RCW 46.25.090.^{FN4} AR at 43, 59 (capitalization omitted).

FN3. RCW 46.20.3101 states, in relevant part:

Pursuant to RCW 46.20.308, the department shall suspend, revoke, or deny the arrested person's license, permit, or privilege to drive as follows:

....

(2) In the case of an incident where a person has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was 0.08 or more:

(a) For a first incident within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, suspension for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for two years.

FN4. RCW 46.25.090 states:

(1) A person is disqualified from driving a commercial motor vehicle for a period of not less than one year if a report has been received by the department pursuant to RCW 46.20.308 or 46.25.120, or if the person has been convicted of a first violation, within this or any other jurisdiction, of:

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(a) Driving a motor vehicle under the influence of alcohol or any drug;

(b) Driving a commercial motor vehicle while the alcohol concentration in the person's system is 0.04 or more, or driving a noncommercial motor vehicle while the alcohol concentration in the person's system is 0.08 or more, or is 0.02 or more if the person is under age twenty-one, as determined by any testing methods approved by law in this state or any other state or jurisdiction;

....

(e) Refusing to submit to a test or tests to determine the driver's alcohol concentration or the presence of any drug while driving a motor vehicle.

****68 ¶ 5** At the subsequent administrative hearing that Lynch requested, she argued that her license suspension should be rescinded because (1) Garden lacked a legal basis to make contact with her on the night of her arrest, (2) Garden lacked a sufficient basis to believe that Lynch was driving while impaired, (3) the BAC machine was not an approved device, making the results inadmissible, and (4) Lynch was denied the opportunity to make a knowing and intelligent decision regarding whether she should take the breathalyzer test.

¶ 6 The administrative hearing officer found that (1) the initial contact was justified based on Lynch's vehicle traveling 80 miles per hour (mph) in a 60 mph zone; (2) Garden had probable cause to arrest Lynch based on "behavioral and physical indicia of alcohol consumption," Lynch's admission that she had consumed alcohol, and Lynch's 0.125 result from the PBT that indicated Lynch had been driving her vehicle in violation of RCW 46.61.502; (3) the BAC DataMaster machine was approved and the results admissible;***704** and (4) Garden "informed [Lynch] of the implied consent rights and warnings," and Lynch "expressed no confusion

regarding the[] implied consent rights and warnings and signed the form." AR at 4. Additionally, the hearing officer concluded that Lynch "did not express confusion and the warnings that appear on the form are exactly what are listed in the statute. [Lynch] was properly informed of the rights and warnings required by RCW 46.20.308. [Lynch] had an opportunity to make a knowing and intelligent decision about taking the test." AR at 6. The hearing officer sustained the Department's suspension of Lynch's driving privileges under RCW 46.20.308 .

¶ 7 On August 19, Lynch appealed the Department's order to the superior court, arguing that the "hearing examiner erred in failing to suppress the breath test, as the [implied consent] warnings read to ... Lynch [we]re misleading and inaccurate and deprived her of an opportunity to make a knowing and intelligent decision regarding whether or not to submit to the breath test." Clerk's Papers (CP) at 8. The superior court reversed the hearing examiner's ruling, holding that

the implied consent warnings read to ... Lynch were misleading in two respects: 1) the warnings implied the availability of the ignition interlock license would serve as a remedy for CDL disqualification; and 2) the warning was misleading as to the length of the CDL disqualification. The misleading nature of the warning prejudiced ... Lynch's ability to make a knowing and intelligent decision whether to take the BAC test.

CP at 139 (capitalization omitted). The superior court denied the State's reconsideration motion. We granted the State discretionary review.^{FN5}

FN5. We consider appeals from superior court orders affirming or reversing driver's license suspensions as motions for discretionary review under RAP 2.3(d). *Eide v. Dep't of Licensing*, 101 Wash.App. 218, 222-23, 3 P.3d 208 (2000).

***705 ANALYSIS**

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¶ 8 The State argues that the superior court erred in reversing the Department's order and in finding that the implied consent warnings were misleading. Lynch responds that the superior court properly reversed the Department's order because the warnings were misleading and implied that any CDL disqualification could be remedied by an ignition interlock driver's license and that the duration of the CDL disqualification would be for the same period of time as the suspension or revocation of Lynch's personal driver's license. We agree with the State.

****69** I. Implied Consent Warning under RCW 46.20.308

A. Standard of Review

[1] ¶ 9 The validity of implied consent warnings is a question of law that we review de novo. *Jury v. Dep't of Licensing*, 114 Wash.App. 726, 731, 60 P.3d 615 (2002). We review the administrative order to determine whether the Department committed any errors of law, and we uphold findings of fact supported by substantial evidence. RCW 46.20.308(9); *Clement v. Dep't of Licensing*, 109 Wash.App. 371, 374, 35 P.3d 1171 (2001).

B. Implied Consent Statute

[2][3] ¶ 10 Washington's implied consent statute, RCW 46.20.308, "was enacted (1) to discourage persons from driving motor vehicles while under the influence of alcohol or drugs, (2) to remove the driving privileges of those persons disposed to driving while intoxicated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication." *Cannon v. Dep't of Licensing*, 147 Wash.2d 41, 47, 50 P.3d 627 (2002). Under RCW 46.20.308(1), Washington drivers "are presumed to have consented to a breath or blood test to determine alcohol *706 concentration if arrested for DUI, but drivers may refuse the test." *State v. Elkins*, 152 Wash.App. 871, 876, 220 P.3d 211 (2009). "The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." *Elkins*, 152 Wash.App. at

876, 220 P.3d 211 (quoting *State v. Bostrom*, 127 Wash.2d 580, 590, 902 P.2d 157 (1995)).

[4][5] ¶ 11 RCW 46.20.308(2), Washington's implied consent statute, requires that:

The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

Washington courts review the warnings the arresting officer provided to ensure that the officer provided all the required warnings and that they were not inaccurate or misleading. See *Gonzales v. Dep't of Licensing*, 112 Wash.2d 890, 896-98, 774 P.2d 1187 (1989). "The warnings must permit someone of normal intelligence to understand the consequences of his or her actions." *Jury*, 114 Wash.App. at 731, 60 P.3d 615.

[6][7][8][9] ¶ 12 "The result of a breath test must be suppressed if (1) the inaccurate warning

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deprives the driver of the opportunity*707 to make a knowing and intelligent decision, and (2) the driver demonstrates that [s]he was actually prejudiced by the inaccurate warning.” *Dep’t of Licensing v. Grewal*, 108 Wash.App. 815, 822, 33 P.3d 94 (2001) (footnote omitted); see also *Gonzales*, 112 Wash.2d at 902, 774 P.2d 1187. But an arresting officer need not ensure that the driver does in fact make a knowing and intelligent decision regarding whether to refuse the test; the driver only needs to have the opportunity to exercise informed judgment. *Medcalf v. Dep’t of Licensing*, 133 Wash.2d 290, 299, 944 P.2d 1014 (1997). Such opportunity is provided when, before being asked to submit to a breath or blood test, the officer informs the driver of the rights and consequences under the statute. *Jury*, 114 Wash.App. at 731–32, 60 P.3d 615.

¶ 13 The exact words of the implied consent statute are not required “so long as the meaning implied or conveyed is not different **70 from that required by the statute.” *Jury*, 114 Wash.App. at 732, 60 P.3d 615. A warning, either in general language or in statutory terms, which neither misleads nor is inaccurate and which permits the suspect to make inquiries for further details is adequate. *Jury*, 114 Wash.App. at 732, 60 P.3d 615; *Clyde Hill v. Rodriguez*, 65 Wash.App. 778, 784–85, 831 P.2d 149 (1992).

¶ 14 Here, the implied consent warnings Garden read to Lynch contained all the statutorily required warnings under RCW 46.20.308 as well as an additional warning regarding CDL disqualification. The parties agree that the warnings were a correct statement of the law.

¶ 15 The last paragraph of the warnings, which includes the warning regarding CDL disqualification and which is the focus of Lynch’s appeal, is not required by the implied consent statute but rather its origins are from RCW 46.25.090(1). Lynch and the State disagree whether the warnings as provided to Lynch would mislead a driver of normal intelligence to believe that (1) her CDL endorsement disqualification would be for the same period of time

as her driver’s license suspension or revocation or (2) she *708 could apply for an ignition interlock license to remedy the CDL disqualification.

¶ 16 Washington courts have held that warnings were inaccurate or misleading when (1) the arresting officer failed to inform driver of the right to take additional tests, *Connolly v. Dep’t of Motor Vehicles*, 79 Wash.2d 500, 504, 487 P.2d 1050 (1971); (2) the arresting officer stated that a refusal “shall,” as opposed to “may,” be used in a criminal trial, *State v. Whitman County Dist. Court*, 105 Wash.2d 278, 287–88, 714 P.2d 1183 (1986); (3) the arresting officer attempted to clarify the warnings by telling the driver that her license would “probably” be suspended if she refused the test, *Mairs v. Dep’t of Licensing*, 70 Wash.App. 541, 545–46, 854 P.2d 665 (1993); (4) the arresting officer told the driver that if he refused to take the test, his license would be revoked “probably for at least a year,” which the court found to be inaccurate because it “implied[d] that a possibility exist [ed] that [the driver’s] license might be revoked for less than 1 year,” *Cooper v. Dep’t of Licensing*, 61 Wash.App. 525, 528, 810 P.2d 1385 (1991); and (5) the arresting officer informed the driver that additional tests would be at his own expense, failing to inform the driver that, if the driver were indigent, the costs would be waived. *State v. Bartels*, 112 Wash.2d 882, 889, 774 P.2d 1183 (1989).

¶ 17 In each of these cases, the inadequate warnings either omitted a portion of the warnings the implied consent statute mandated or were legally inaccurate. Lynch has cited no authority providing that legally accurate warnings were misleading. On the other hand, our courts have held that the warnings provided were not inaccurate or misleading when, (1) in addition to the implied consent statute’s required warnings, the officer informed the driver of the RCW section and description of the offense for which he was arrested, *Grewal*, 108 Wash.App. at 821–22, and (2), 33 P.3d 94 the warnings provided contained all the statutorily required warnings, as well as additional information

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about what would happen if the driver violated the criminal *709 statutes that prohibit driving while under the influence. *Pattison v. Dep't of Licensing*, 112 Wash.App. 670, 676–77, 50 P.3d 295 (2002).

[10] ¶ 18 Lynch argues that the warnings she received falsely encouraged her to submit to the breath test by implying that her CDL would be disqualified for the same period as her personal driver's license suspension or revocation, namely, 90 days if she failed the breath test and one year if she refused to take the test. Lynch points out that under RCW 46.25.090, a driver's CDL is disqualified for “not less than one year” if the driver fails the breath test or refuses to take the test. But we disagree with Lynch because the warnings provided did not state the duration of her CDL disqualification and did not imply that such disqualification would be for the same period of time as her driver's license suspension.

¶ 19 The statement provided to Lynch concerning potential CDL disqualification followed the required implied consent warnings, identifying it as an additional consequence of having her personal driver's license either suspended or revoked. The warning Lynch **71 received was an accurate statement of the law concerning CDL disqualification. And the CDL notification referred to CDL “disqualification” as opposed to personal driver's license “suspension or revocation,” correctly implying that it is a separate consequence. The warnings provided were not confusing or overly wordy but, rather, added to Lynch's body of knowledge to use in deciding whether to take the breath test or refuse it.

¶ 20 We hold that a person of normal intelligence, if provided the warnings read to Lynch, would not be led to believe either that the CDL disqualification (1) could be remedied by an ignition interlock driver's license or (2) would last only as long as the driver's license suspension or revocation. The warnings permitted Lynch to ask for further details, which she declined to do.

*710 II. Actual Prejudice Not Shown

[11] ¶ 21 Lynch also claims that the warnings actually prejudiced her. “[A] showing of actual prejudice to the driver is appropriate in a *civil* action where the arresting officer has given all of the warnings, but merely failed to do so in a 100 percent accurate manner.” *Thompson v. Dep't of Licensing*, 138 Wash.2d 783, 797 n. 8, 982 P.2d 601 (1999).

¶ 22 Lynch relies on *Whitman*, 105 Wash.2d at 287, 714 P.2d 1183, *Gonzales*, 112 Wash.2d at 901, 774 P.2d 1187, *Graham v. Dep't of Licensing*, 56 Wash.App. 677, 680, 784 P.2d 1295 (1990), and *Gahagan v. Dep't of Licensing*, 59 Wash.App. 703, 706–07, 800 P.2d 844 (1990) to support her argument that the given warnings prejudiced her but, in these cases, the court first found that the warnings were inaccurate because they improperly omitted that an indigent driver need not pay for additional tests.

¶ 23 Lynch also relies on *Thompson*. *Thompson* involved a collateral estoppel doctrine issue and the court addressed the prejudice requirement only in dicta in a footnote. 138 Wash.2d at 797 n. 8, 982 P.2d 601. The Department had found that the implied consent warnings given were, in fact, not confusing or misleading because each warning correctly stated the law. *Thompson*, 138 Wash.2d at 797 n. 8, 982 P.2d 601. Thompson signed the implied consent forms, expressed no confusion, and told the arresting officer he understood them. *Thompson*, 138 Wash.2d at 797 n. 8, 982 P.2d 601 (citing *Thompson v. Dep't of Licensing*, 91 Wash.App. 887, 896–97, 960 P.2d 475 (1998)). Our court “held there was no prejudice because Thompson's commercial license would have been disqualified for one year no matter what course he took. That is, refusal would have resulted in a one-year disqualification under the statute, and taking the test resulted in a one-year disqualification because his reading was above 0.04.” *Thompson*, 138 Wash.2d at 797 n. 8, 982 P.2d 601. In the same footnote, the Supreme Court characterized the ap-

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pellate court's prejudice analysis as "too facile." *Thompson*, 138 Wash.2d at 797 n. 8, 982 P.2d 601. It agreed with Thompson's *711 contention that, " 'If the Court of Appeals is correct [about] the meaning of prejudice, then the trooper did not need to give Thompson *any* implied consent warnings, because no matter what Thompson's decision, the penalty would be the same, and therefore, no prejudice.' " *Thompson*, 138 Wash.2d at 797 n. 8, 982 P.2d 601 (quoting *Thompson*, 91 Wash.App. 887, 960 P.2d 475; Pet. for Review at 7). Moreover, the Supreme Court stated that the appellate court's analysis "provide[d] no disincentive to law enforcement officials to give improper implied consent warnings." *Thompson*, 138 Wash.2d at 797 n. 8, 982 P.2d 601.

[12] ¶ 24 Here, Lynch argues that, if the CDL warning had not been given to her, she would have strategically refused the BAC test to assist her defense of potential criminal charges arising from the incident. This represents speculation about subsequent actions by the State on this record, as there is no evidence of criminal proceedings before us. The issue in this case is the Department's civil action suspending and disqualifying Lynch's licenses, not criminal charges. Furthermore, if a driver intends to always refuse the BAC test in hopes of defeating possible subsequent criminal charges, then license suspension, revocation, and disqualification of at least one year will result from that refusal and will be a factor in most civil proceedings.

**72 [13] ¶ 25 We hold that implied consent warnings that are neither inaccurate nor misleading do not result in prejudice to the driver in civil proceedings. Because the warnings here were accurate and not misleading, and Lynch confirmed to the arresting officer that she understood the warnings, her claim of actual prejudice in the civil proceedings fails. Thus, we affirm the Department's orders suspending her personal license and disqualifying her CDL endorsement, in effect, reversing the superior court and holding that the warnings provided to Lynch were sufficient as RCW 46.20.308 requires,

not misleading, and did not prejudice Lynch.

We concur: PENOYAR, C.J., and JOHANSON, J.

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NO. 41718-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROGER R. MARTIN,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING,
Appellant.

DECLARATION OF
SERVICE

I, Kathryn Riske, certify that I caused a copy of **Opening Brief of Appellant** to be served on all parties or their counsel of record on the date below:

**Via e-mail and US Mail via
Consolidated Mail Service:**

Diana Lundin
Phillipson & Lundin, PLLC
710 Tenth Ave. E.
Seattle, WA 98102
DLundin@PhillipsonLundin.com

Original e-filed with:

Court of Appeals Division II

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 7 day of March, 2012.


KATHRYN RISKE, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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